

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). The opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS DUARTE,

Defendant and Appellant.

G051026

(Super. Ct. No. 13NF4565)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Vickie L. Hix, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Appeal dismissed.

Rex Adam Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

Defendant Luis Duarte pleaded guilty to six felony counts of indecent exposure (Pen. Code, § 314, subd. (1); all statutory references are to the Penal Code) and misdemeanor failing to register as a sex offender (§ 290.018, subd. (a)). He contends the trial court erred by modifying the terms of his probation to require him to submit to electronic monitoring supervision (GPS). We dismiss Duarte's appeal because he is currently a fugitive.

I

FACTUAL AND PROCEDURAL BACKGROUND

The Orange County District Attorney filed a felony complaint in January 2014 charging Duarte with violating section 314, subdivision (1), by publicly exposing his genitalia in view of others on six occasions. The complaint also alleged Duarte had suffered a prior indecent exposure conviction (§ 314.1, subd. (a)) in May 2002, and that he had failed to register as a sex offender (§§ 290.012, subd. (a) & 290.018, subd. (a)).

In February 2014, Duarte pleaded guilty to the offenses. Duarte agreed to accept probation on the terms and conditions listed on the guilty plea (*Tahl*) form. The court suspended imposition of judgment, and placed Duarte on probation under the "terms and conditions as set forth in the *Tahl* form. . . ." No mention of electronic monitoring was made on the *Tahl* form or at the sentencing hearing. Duarte agreed to cooperate with his probation or mandatory supervision officer in any plan for psychological or psychiatric treatment, maintain an approved residence, and refrain from associating with known felons.

In August 2014, the probation officer filed a progress report with the court noting Duarte's case had been assigned to the county probation department's sex crimes unit. The unit manages adult probationers convicted of sex-related crimes using the Containment Model, which features intensive supervision, specialized treatment, and polygraph examinations. According to the report, Duarte had been reporting to his probation officer as directed, but he had not been located at the residence address he

provided during several attempted home visits. Other residents reported Duarte resided at the home, but he was away from the home during the day. Duarte claimed he spent much of his time either seeking employment or at his friend's auto body shop. Duarte was unemployed and did not have a cell phone, but he was current with his section 290 registration, and attended the sex offender treatment program. He previously had been under GPS by the federal immigration authorities (ICE) until June 24, 2014, when the GPS device was removed by ICE. He continued to attend court hearings concerning his residency status.

Based on Duarte's uncertain residency status and the unsuccessful attempts to locate Duarte at his reported residence, the probation officer felt GPS monitoring was "necessary to enhance supervision and assist . . . in accounting for [Duarte's] whereabouts in the community. Additionally, the use of GPS monitoring [would] assist . . . in monitoring" Duarte's compliance with the probation condition prohibiting him from visiting a park in Anaheim where he committed his offenses.

The trial court conducted a hearing on the probation department's request. Duarte objected to GPS monitoring on the grounds he had not violated his probation, he had a stable residence, and he had a serious illness requiring dialysis. He also claimed he recently had a heart attack, and his blood pressure medication impaired his memory. Duarte's lawyer argued there was no allegation Duarte had been dishonest about his whereabouts, and "nothing ha[d] transpired . . . which had changed the state of the case" other than the immigration authorities were no longer monitoring him via GPS.

The court noted Duarte had been on probation seven months, which was "not that long of a period of time." The court found a change of circumstances because Duarte was "no longer on GPS" through immigration authorities. The court inferred there had been "exchange of information" between immigration and probation officials. The court noted Duarte had been away from home during the day when the probation officer visited, "[w]e don't know where he is during the day," and he committed the

offenses also while “away from home during the day.” The court concluded: “It appears that for public safety, and the fact that he is a [sex offender] registrant and is directly related to the charges [*sic*], there has been a change in circumstances, in that the GPS provided by [immigration authorities] is no longer on him, and that it would be appropriate . . . as deemed necessary by the probation officer, to assist in monitoring him and supervising him, and I will authorize the placement of a GPS.” The court stated Duarte could bring a motion for an evidentiary hearing to contest the authorization.

Duarte objected to the court accepting the probation officer’s progress report without a hearing, and complained the court had to “fill in some of the blanks . . . namely, the sharing of information.” Counsel stated he had no information the probation officer had been monitoring Duarte through immigration’s GPS monitoring. The court invited defense counsel to “call . . . witnesses,” but counsel argued the burden was on the People. The court stated “probation is to the court, and this isn’t a motion brought by the People. This is a motion brought by probation. I have before me a report, which I believe the court can accept, and today was the day set for a hearing on the matter.” The court admitted the progress report over counsel’s objection. Counsel stated his objection was noted and he did not call any witnesses. A GPS monitoring unit was placed on Duarte on October 1, 2014, and Duarte was indoctrinated to the terms and conditions for continuous GPS monitoring.

The clerk’s transcript contains a petition for warrant of arrest filed by the probation officer on November 12, 2014. The petition alleged Duarte failed to report to his probation officer on November 10, and on that date Duarte’s GPS device generated a signal the device’s straps had been cut. The petition stated Duarte’s roommate and landlord had possession of the GPS device with the straps cut and informed the probation officer Duarte left the residence, stating he was leaving to go to Mexico and not returning to the United States. The probation officer stated Duarte’s whereabouts were unknown.

Duarte's lawyer filed a notice of appeal from the October 1, 2014, order on November 19, 2014.

II

DISCUSSION

Court Dismisses Duarte's Appeal Because He Is a Fugitive

The Attorney General invites this court to exercise its discretion to dismiss the appeal because Duarte is a fugitive from justice and not within the control of the trial court. (*People v. Redinger* (1880) 55 Cal. 290, 298 [a convicted fugitive has no right to appeal because court lacks control over the person charged so that its judgment might be made effective]; *People v. Kubby* (2002) 97 Cal.App.4th 619, 622, 623 ["fugitive has no right to ask the courts to review the very judgment that the fugitive flouts"]; *People v. Brych* (1988) 203 Cal.App.3d 1068, 1075-1076 [court dismissed the appeal of a defendant who voluntarily emigrated from the United States after serving his prison sentence, severed all contact with his attorneys, and would not disclose his current location]; see *Smith v. United States* (1876) 94 U.S. 97 [appellate court has discretion to dismiss an appeal when the appellant is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail].) The deputy attorney general submitted a declaration attached to her brief stating she spoke with Duarte's appellate counsel on February 26, 2015, and learned he had not spoken with Duarte since he became a fugitive. She also spoke with Duarte's assigned probation officer, who stated the bench warrant issued for Duarte on November 12, 2014, remained outstanding. (See *People v. Puluc-Sique* (2010) 182 Cal.App.4th 894, 897; Cal. Rules of Court, rules 8.54(a)(2)), 8.204(e)(2)(C).)

Duarte's appellate counsel responds the issuance of a bench warrant does not establish Duarte is a fugitive (*People v. Kubby, supra*, 97 Cal.App.4th at p. 624 [a fugitive is one who flees the jurisdiction of the court with knowledge he is being sought by the court process]) because "nothing shows appellant was aware a bench warrant was

issued. [¶] Additionally, while the issuance of a bench warrant suggests appellant cannot be located, respondent's suggestion that appellant has fled to Mexico, based upon what a roommate told a probation officer appellant said, remains an allegation based on rumor, nothing more. The court should not use the 'blunt weapon' of the disentitlement doctrine based upon rumor." We find this argument unpersuasive.

The appellate record contains sufficient evidence to conclude Duarte has absconded from supervision and is therefore a fugitive from justice whose appeal should be dismissed. (*U.S. v. Gonzalez* (9th Cir. 2002) 300 F.3d 1048, 1051 [failing to comply with a reporting requirement imposed as a condition of probation may trigger appellate disentitlement doctrine where there is evidence the defendant has fled or hidden from the jurisdiction of the court].) The November 12, 2014, petition for revocation of probation, signed by the probation officer under penalty of perjury, combined with the deputy attorney general's declaration reflecting Duarte's whereabouts remain unknown, suffices to establish Duarte removed his GPS device and absconded from the court's jurisdiction. Whether he is in Mexico or elsewhere is immaterial.

III

DISPOSITION

The appeal is dismissed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.